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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RAMONA PLANK,

Plaintiff and Appellant,

v.

TANYA LUNA MOUNT et al.,

Defendants and Respondents.

E053769

(Super.Ct.No. CIVRS804099)

OPINION

APPEAL from the Superior Court of San Bernardino County. Barry L. Plotkin,
Judge. Affirmed.

Jeff Grotke for Plaintiff and Appellant.

Leah Saffian for Defendants and Respondents.

“Happy families are all alike; every unhappy family is unhappy in its own way.”

(Leo Tolstoy (1828-1910), *Anna Karenina*, Chapter 1, 1.)

Ramona Plank filed an action under Welfare and Institutions Code section 15657,
for damages for elder neglect and financial abuse. Her father, George Mount, died of

undiagnosed end stage metastatic lung cancer at the age of 88, while being cared for by his daughter (and Ramona's sister), defendant Tanya Mount, aided by Tanya's son, codefendant Joaquin Renteria. Specifically, plaintiff asserted that Tanya's failure to obtain hospice care for Mr. Mount early enough to provide palliative care and prevent dehydration and malnutrition caused Mr. Mount harm. After a bench trial, the court concluded that Mr. Mount was capable of refusing medical treatment, and that his malnutrition and dehydration were not caused by any lack of care by defendants. Plaintiff appealed.

On appeal, plaintiff asserts that there is insufficient evidence to support the judgment. We affirm.

BACKGROUND

George Mount died On July 25, 2006, at the age of 88.¹ At the time of his death, he was emaciated and dehydrated, and, during the autopsy, it was learned he suffered from carcinoma of the right lung which had metastasized to his right kidney and adrenal glands. The lung cancer was never diagnosed prior to Mr. Mount's death.

Plaintiff, Ramona Plank, is a daughter of George Mount. Tanya Mount, another

¹ The parties stipulated to the admissibility of certain records, including the autopsy report, from which we gleaned much information that was not elicited during the testimony.

daughter of Mr. Mount, is plaintiff's sister. Joaquin Renteria is Tanya's son.² Tanya moved in with Mr. Mount prior to the death of her mother (Mr. Mount's wife) from cancer in 2004, and stayed on as his caretaker thereafter. In June 2004, Mr. Mount executed a Durable Power of Attorney for Health Care, nominating Tanya as his attorney in fact to make health care decisions for him.

In 2005, after Mr. Mount's driver's license expired, Tanya started taking Mr. Mount to his doctor appointments. During the last part of Mr. Mount's last year of life, his doctor became concerned about rising PSA levels (prostate specific antigen), and referred Mr. Mount to a urologist. The urologist wanted to perform a biopsy, but Mr. Mount refused. Mr. Mount was aware that prostate cancer was a slow-progressing disease and did not want treatment.

At a doctor's appointment on April 24, 2006, Mr. Mount weighed a little less than 112 pounds. At that appointment, Dr. Cundari, Mr. Mount's personal doctor, informed Tanya that her father was declining and that he could die at any time. After that appointment, Mr. Mount declined medical treatment. He did not believe in prolonging life and frequently discussed his views about declining treatment at the end stage of life, as well as his desire to stay at home. At the time of his death, he weighed 88 pounds.

Until April or June 2006, Mr. Mount was ambulatory and able to feed himself,

² Joaquin was never asked who his mother was. However, he testified that he aided his mother in caring for his grandfather, and that his mother was the primary caregiver of Mr. Mount. We infer from these facts that his mother was Tanya.

although he used a cane. He was able to feed himself until the last week of his life. In the month before he died, Mr. Mount used Depends and was bedridden for a week or two before he died. However, he remained lucid. By most accounts, he was reasonably well cared for. However, plaintiff was concerned about foul play and sought legal advice from an attorney.

The last time plaintiff had seen her father was in September 2005. On September 27, 2005, plaintiff had asked if she could come to visit her father on his birthday, but was told by Tanya that they were busy and that Mr. Mount did not feel well. Plaintiff went to her father's house anyway, taking an elderly aunt, only to discover that a big birthday party was taking place for her father. In the bathroom, plaintiff discovered dog feces on the floor. Plaintiff informed Tanya of the dog feces but Tanya said it was Mr. Mount's responsibility and yelled at her father to clean it up. Plaintiff did not hear from her father and was unable to see her father again after September 2005, and attributed the alienation to Tanya. She was troubled when she learned that he suffered from malnutrition and dehydration when he died, as well as by the fact they waited so long to call hospice.

Plaintiff's son, Alexander Plank, saw his grandfather, Mr. Mount, three or four times per month in the last year of his grandfather's life. Alexander had always been very close to his grandfather and visited regularly until his last visit, which took place in July 2006. In July 2006, he was only able to visit his grandfather if he just showed up, because if he called in advance, he was told it was a bad time to come over. At the July 2006 visit, which occurred approximately two weeks prior to Mr. Mount's death, his

grandfather was thin, out of breath, in bed and not able to walk. Mr. Mount complained to Alexander about pain and stated he had difficulty sleeping because he coughed up large amounts of mucous every four hours. Alexander noted that his grandfather's room had an "old bed smell" and that the skin of his grandfather's legs was flaking. A lot of flaked skin was in the bed, so Alexander brushed off the bed.

In the last week of his life, Mr. Mount had no appetite, so Tanya fed him soups and Ensure, a nutritional supplement. A home health nurse came out to visit him the night before he passed away, pursuant to a referral to hospice provided by Mr. Mount's doctor. In the meantime, the home health nurse noted that Mr. Mount was delirious and semiconscious, likely due to dehydration, and malnutrition. He also had early stage bed sores. The home health worker prepared an assessment and made a referral for hospice caregivers, who were to report the next day. Mr. Mount passed away shortly before the hospice worker arrived. Tanya did not realize her father was malnourished or dehydrated until after he died because the visiting nurse did not tell her.

A nursing expert who reviewed the report of the home health nurse and the autopsy report, which indicated Mr. Mount suffered from end stage metastatic lung cancer, concluded that Mr. Mount's caregivers had not used a reasonable standard of care in attending to him. Her opinion was based on the preventability of dehydration and malnutrition, failure to call 911, and failure to arrange for hospice care to provide comfort measures. The nursing expert also explained that the bed sores were easily preventable by slight turning of the patient.

Plaintiff filed a complaint for elder abuse against Tanya Mount and her son Joaquin Renteria, alleging two causes of action for wrongful death due to elder abuse or neglect.³ Following a bench trial, the court concluded there was no credible evidence that lack of care by the defendants caused harm to George Mount, and awarded judgment in favor of the defendants. Plaintiff appealed.

DISCUSSION

On appeal, plaintiff complains that the court committed reversible error in finding there was no evidence of harm caused by neglect, and that the court failed to render a complete verdict. We disagree.

a. Standard of Review

We review the judgment for substantial evidence. Under the substantial evidence standard of review, we review the entire record to determine whether there is substantial evidence supporting the jury's factual determinations. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) We resolve all conflicts in the evidence in favor of respondent, the prevailing party, and indulge all legitimate and reasonable inferences in favor of upholding the trial court's findings. (*Bookout v. Nielsen* (2007) 155 Cal.App.4th 1131, 1137-1138; *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1254-

³ The complaint also named Maricela Renteria; it included a third cause of action for financial elder abuse, as well as a fourth cause of action for rescission. The third and fourth causes of action were dismissed on plaintiff's motion prior to the commencement of the trial, and Maricela Renteria was dismissed as a party defendant at the conclusion of her testimony. While the complaint alleged wrongful death, the theory presented at trial was that neglect caused harm, not death.

1255.) The issue is not whether there is evidence in the record to support a different finding, but whether there is some evidence that, if believed, would support the findings of the trier of fact. (*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 429-430, fn. 5.)

It is for the trial court to weigh the evidence and consider the demeanor and credibility of the witnesses. (*Bookout v. Nielsen, supra*, 155 Cal.App.4th at p. 1141.) The testimony of a single witness, even a party, is sufficient to provide substantial evidence to support a factual finding. (*Fariba v. Dealer Services Corp.* (2009) 178 Cal.App.4th 156, 170-171, citing *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) Neither conflicts in the evidence, nor testimony which is subject to justifiable suspicion, justifies the reversal of a judgment, for it is the exclusive province of the trier of fact to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (*Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065.)

b. Substantial Evidence Supports the Judgment

Under Welfare and Institutions Code section 15610.07, abuse of an elder or dependent adult consists of either (a) physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering; or (b) the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering. Neglect as a form of abuse under the Elder Abuse Act refers “to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.” (*Delaney v. Baker* (1999) 20 Cal.4th

23, 34; *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404.)

To constitute neglect within the meaning of the Elder Abuse Act, and thereby trigger the enhanced remedies available under the act, a plaintiff must allege and prove by clear and convincing evidence that the defendant (1) had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene or medical care; (2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs; and (3) denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs, either with knowledge that injury was substantially certain to befall the elder or dependent adult, or with conscious disregard of the high probability of such injury. (Welf. & Inst. Code, §§ 15610.07, subd. (b), 15610.57, subd. (b), 15657; *Carter v. Prime Healthcare Paradise Valley LLC*, *supra*, 198 Cal.App.4th at pp. 406-407, and cases cited.)

Insofar as elder abuse may be based on neglect, the elements of any negligence cause of action are duty, breach of duty, proximate cause, and damages. (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 526.) The test for establishing cause in fact asks whether the defendant's conduct was a substantial factor in bringing about the injury. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1049.)

Heightened remedies are provided under Welfare and Institutions Code section 15657, if the plaintiff establishes recklessness, oppression, fraud or malice in the commission of the abuse or neglect. "Recklessness" refers to a subjective state of

culpability greater than simple negligence, involving deliberate disregard of the high degree of probability than an injury will occur. (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 972.) To trigger the enhanced remedies for neglect under the Elder Abuse Act, the plaintiff must thus allege (and ultimately prove by clear and convincing evidence) that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering. (Welf. & Inst. Code, §§ 15610.07, subds. (a), (b), 15657; *Carter v. Prime Healthcare Paradise Valley LLC*, *supra*, 198 Cal.App.4th at p. 407.)

Recklessness has been found where a patient in a nursing facility while recovering from a broken ankle was neglected for four months and the neglect led to her death. (See *Delaney v. Baker*, *supra*, 20 Cal.4th at p. 31[elderly woman developed multiple advanced-stage bedsores on her ankles, feet and buttocks, had been frequently left lying in her own urine and feces for extended periods and the neglect occurred despite the fact the decedent's daughter frequently complained].) In this case, plaintiff failed to show recklessness. It is true that Mr. Mount had an early stage bedsore at the time of his death, but this fact alone is insufficient to establish the higher state of culpability for recklessness. Given the evidence that Mr. Mount was in relatively good condition (lucid, ambulatory and able to feed himself) until the week or so preceding his death, there was no evidence that Mr. Mount had been neglected for an extended period of time with deliberate disregard.

Nor did plaintiff establish simple negligence because the element of causation is lacking. While it may be said in hindsight that defendants failed to ease Mr. Mount's

suffering, there was no evidence that defendants' conduct *caused* it. To the contrary, the evidence was overwhelming that Mr. Mount suffered from end stage lung cancer (and possibly prostate cancer) which caused his suffering during the last week of his life.

Except for the isolated incident in September 2005, involving the incident with the dog feces in the bathroom while Mr. Mount was still active, defendant's care of Mr. Mount was described as adequate. The relevant period, however, is the last week or so of his life, when he was wasting away due to end stage lung cancer. Nevertheless, even if defendants breached the duty of care by failing to provide palliative care for Mr. Mount prior to the eve of his death, they did not cause his suffering. They caused suffering only to plaintiff and her family, but the Elder Abuse Act provides no remedy for family alienation.

There was substantial evidence to support the trial court's judgment.

DISPOSITION

The judgment is affirmed. Costs are awarded to respondents.

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RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

McKINSTER

J.